Supreme Court, U.S.
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No. 98-648

IN THE
Supreme Court of the United States
October Term, 1998

**DONALD P. O'CONNELL,
MARGARET KOSTOPULOS,
and DAWN CATUARA,**

Petitioners,

v.

ANNMARIE MILAZZO,

Respondent.

**Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. The Petition Is Ripe For Immediate Consideration.

A. The Issues Presented Do Not Require Factual Development.

Respondent suggests that the petition is premature because some discovery remains to be taken. Resp. Br. 4. To the contrary, no further factual development is necessary for this Court to address whether the propriety of a political dismissal depends on the potential inherent in the position (as other

circuits have held) or instead on the duties performed by the terminated employee on the date of his or her termination. That is Question 1 of Chief Judge O'Connell's certiorari petition. Likewise, no factual development is needed to determine whether that inquiry is one that should be entrusted to a court (as the First, Second, Fourth, and Sixth Circuits have held) or to a jury (as the Third, Fifth, and Seventh Circuits have held). That is Question 2. Finally, no factual development is necessary to address whether a state official may be subjected to a jury trial because of a court of appeals' refusal to consider the official's properly presented and well founded defense of qualified immunity. That is Question 3.

This case reaches this Court following summary judgment proceedings. Respondent specifically requested and received discovery under Rule 56(f) before the district court ruled. She took what discovery she needed to oppose summary judgment and never complained in the courts below that the discovery she received was inadequate.

B. Delaying This Court's Review Will Thwart The Doctrine Of Qualified Immunity.

Respondent's prematurity argument is unfounded for one more reason: it seeks to consign Chief Judge O'Connell and his staff to the burden and expense of a trial by jury even though the most recent ruling on the issue upheld their defense of qualified immunity. This Court fashioned the qualified immunity defense to protect public officials from "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Because discovery "'[i]nquiries . . . can be

pecularily disruptive of effective government,'" an official should not be subject to them unless the plaintiff first makes a credible case that the official engaged in conduct violative of "clearly established" rights. *See Behrens v. Pelletier*, 516 U.S. 299, 308 (1996). Those considerations apply with special force here, because the Chief Judge of the Circuit Court of Cook County is charged with responsibility for leading the 416 Judges of that Court, plus his own 550-person Office, plus the almost 2,000 employees of the other six Circuit Court departments. R. 55, Wisniewski Aff. ¶ 11. Respondent should not be allowed to defy this Court's qualified immunity precedents and force Chief Judge O'Connell to defend his staffing decisions before a federal jury by the simple expedient of pronouncing the questions presented by the petition "premature."

II. The Petition Presents Two Significant And Widespread Circuit Splits.

A. The Decision Below Contributes To A Circuit Split Concerning How To Determine Whether An Office Holder Is Shielded From Politically Motivated Dismissal.

Without addressing or citing any of the decisions of other circuits with which the Seventh Circuit's decision is in direct conflict, respondent insists that a "careful review" of the decision below reveals that it is in harmony with the decisions of other circuits that have considered whether a particular office has confidential or policymaking potential. Resp. Br. 4-5. But respondent cannot deny that the Seventh Circuit has ordered that her political dismissal claim proceed to trial because: (1) respondent contended that the position *at the time she performed it* was merely ministerial; and (2) respondent further

alleged, without any foundation, that Chief Judge O'Connell enhanced the duties of the current Human Resources Administrator to fortify his position in this litigation. Pet. App. 9a.

The holding of the Seventh Circuit forces newly elected public officials to tolerate governmental inefficiency and nonperformance, and thereby conflicts with the decisions of numerous other circuits, which hold that the former position holder's actual past duties will not preclude a politically motivated dismissal if there is confidential or policymaking potential inherent in the position. *E.g.*, *Blair v. Meade*, 76 F.3d 97, 101 (6th Cir. 1996) ("If we were to fashion a rule limiting [the new judge executive's] ability to fire such employees, we would in effect allow a prior judge executive to define for his successors how the office is run."); *see also Mendez-Palou v. Rohena-Betancourt*, 813 F.2d 1255, 1258 (1st Cir. 1987); *Regan v. Boogertman*, 984 F.2d 577, 580 (2d Cir. 1993); *Brown v. Trench*, 787 F.2d 167, 168 (3d Cir. 1986); *Stott v. Haworth*, 916 F.2d 134, 142 (4th Cir. 1990); *Williams v. City of River Rouge*, 909 F.2d 151, 154 (6th Cir. 1990); *Bauer v. Bosley*, 802 F.2d 1058, 1064 (8th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *Green v. Henley*, 924 F.2d 185, 186 (10th Cir. 1991). Notwithstanding respondent's contentions to the contrary, the decision below conflicts squarely with these decisions.

B. The Decision Below Contributes To Another Circuit Split Over Whether A Judge Or Jury Should Decide If An Office Is Subject To Political Dismissals.

Respondent's opposition fails to address in any way another widespread circuit split—to which the decision below contributes—concerning whether the confidential or policymaking character of a position is for the judge or jury to decide. The First, Second, Fourth, and Sixth Circuits treat the question as one of law. *See McGurrin Ehrhard v. Connolly*, 867 F.2d 92, 93 (1st Cir. 1989) (Breyer, J.); *Danahy v. Buscaglia*, 134 F.3d 1185, 1191 (2d Cir. 1998); *Jones v. Dodson*, 727 F.2d 1329, 1336 (4th Cir. 1984); *Mumford v. Basinski*, 105 F.3d 264, 271 (6th Cir.), *cert. denied*, 118 S. Ct. 298 (1997). The Third, Fifth, and Seventh Circuits hold that a jury should decide the question, at least where the facts are in dispute. *See Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985); *Rosenthal v. Rizzo*, 555 F.2d 390, 394 n.5 (3d Cir.), *cert. denied*, 434 U.S. 892 (1977); *Stegmaier v. Trammell*, 597 F.2d 1027, 1034 n.8 (5th Cir. 1979). Review is warranted to resolve this additional circuit conflict, the existence and importance of which respondent does not and cannot dispute.

III. The Seventh Circuit Disregarded The Law In Refusing To Address Petitioners' Qualified Immunity Claim.

Respondent contends that "there was no need to explicitly revisit the qualified immunity issue" on the summary judgment record because the Seventh Circuit had rejected that defense on appeal from the district court's denial of petitioners' motion to dismiss. Resp. Br. 5-6. Respondent ignores that in considering the first appeal, the Seventh Circuit necessarily was confined

to the allegations in respondent's complaint, which set forth her account of her own purportedly "ministerial" duties, but did not address the full potential inherent in the position of Human Resources Administrator. Only when petitioners moved for summary judgment, and were able for the first time to rely on the duties of the present Administrator and other uncontroverted evidence, did that full potential become apparent. Thus, respondent's suggestion that the Seventh Circuit was relieved of any obligation to address petitioners' qualified immunity defense following the grant of petitioners' motion for summary judgment, merely because the court addressed the issue following the denial of petitioners' motion to dismiss, ignores the uncontested facts newly in the record. Indeed, in the first appeal, the Seventh Circuit itself had stated that it might be necessary "to revisit the qualified immunity issue" at the summary judgment stage, "[o]nce the factual record is developed." Pet. App. 31a-32a n.2. The Seventh Circuit's failure to do so is indefensible.

By ordering petitioners—including the Chief Judge of the Circuit Court of Cook County—to trial without consideration of their claim of qualified immunity, the court of appeals ignored the decisions of this Court and effectively sounded the death knell for that defense in the Seventh Circuit. The decision below virtually assures that disgruntled former employees will be able to force state officials to defend their efforts to realize the full potential inherent in their offices at a jury trial. But in doing so, the decision ignores the essential duty of the federal courts in these cases to ensure that public officials are not required to stand trial until their qualified immunity claims are fairly resolved. The Seventh Circuit's disregard of the law of qualified immunity and utter

indifference to the disruptive impact this suit will have upon the Chief Judge of the Circuit Court of Cook County and his Court, coupled with the widespread circuit splits that this decision has fostered, demonstrate that the necessity of certiorari review could not be more clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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